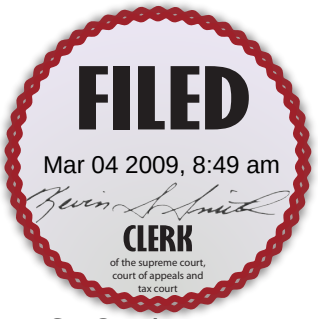

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IN THE
COURT OF APPEALS OF INDIANA

KARA CRISP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 04A03-0810-CR-508
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BENTON CIRCUIT COURT
The Honorable Rex W. Kepner, Judge
Cause No. 04C01-0711-FB-181

March 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kara Crisp appeals her conviction and seven-year sentence for reckless homicide, a class C felony. We affirm.

Issues

I. Did the trial court commit fundamental error in admitting testimony regarding evidence not preserved by the State?

II. Does sufficient evidence support Crisp's conviction?

III. Is Crisp's sentence inappropriate in light of the nature of the offense and her character?

Facts and Procedural History

The facts most favorable to the conviction indicate that on the evening of May 25, 2007, Ishmael Caraballo III and Jeremy Bell ("Jeremy"), Crisp's ex-boyfriend, rode in Jeremy's pickup truck to the Bad Habits Bar in Boswell and began drinking beer. Sometime later, the twenty-two-year-old Crisp drove her current boyfriend's Jeep Cherokee to the bar and consumed beer and mixed drinks with Jeremy, Caraballo, and other friends, including Brittany Escamilla and Jeremy's brother, Brandon. Brandon noticed that Crisp was wearing flip-flops.

Around closing time, Crisp and her friends decided to go to Jeremy's mother and stepfather's home and drink more beer. Jeremy was too intoxicated to drive his truck and had to be helped into the front passenger seat of the Jeep. Caraballo climbed into the back seat, and Crisp got into the driver's seat. None of the three wore a seatbelt. Both Brandon

and Escamilla saw Crisp drive the Jeep out of the bar's parking lot. Crisp took one route toward their intended destination, and her friends took another.

Caraballo either fell asleep or passed out shortly after leaving the bar. He awoke in a cornfield, screaming for help. Caraballo, Crisp, and Jeremy had been ejected from the Jeep, which was traveling at least 105 miles per hour on State Road 352 before it left the road and rolled over several times. A passing motorist saw the overturned Jeep and called 911. When paramedics reached the scene at approximately 5:00 a.m., Jeremy was dead, lying face down in the field approximately 100 feet from the Jeep. Jeremy was wearing socks and no shoes and had dirt in his mouth and on his clothing and skin. His pants were buttoned and pushed down below his buttocks, consistent with being ejected from a vehicle and sliding along the ground.

Paramedics tended to Caraballo, who was lying near Jeremy and had suffered a dislocated elbow and a broken forearm and pelvis. Caraballo "told them to put [him] back down to go find [Crisp] because she was the driver[.]" Tr. at 388.[1] Paramedics then located Crisp, who suffered numerous broken bones and severe injuries to her left arm. When Crisp's mother heard about the accident, she called the ambulance service and told a

[1] Crisp's appellant's appendix contains a substantial portion of the 853-page transcript. Both Crisp and the State cite to the appendix, rather than the transcript, in their appellate briefs. We direct Crisp's counsel's attention to Indiana Appellate Rule 50(A)(2)(g), which requires that an appellant's appendix contain "*brief* portions of the Transcript, that are important to a consideration of the issues raised on appeal[.]" (Emphasis added.) In cases like this, with fact-sensitive issues and a sizable transcript, it is far more helpful (and far more economical) for both parties to cite to the transcript and not to include large portions of the transcript in the appendix.

paramedic that Crisp was "more than likely" the driver of the vehicle "because when [she] had her boyfriend's vehicle, she would not let anybody else drive it but herself." *Id*. at 608.

While surveying the accident site, Sheriff Butch Pritchett saw a sandal with a strap "that would go between the toes" "wedged … onto the accelerator" of the Jeep. *Id*. at 575. The police did not photograph or preserve the shoe. Toxicology tests indicated that Crisp's blood alcohol content ("BAC") was .09, that Jeremy's BAC was .22, and that both Jeremy and Caraballo had used marijuana. Crisp had also used marijuana that night. Neither the coroner who examined Jeremy's body nor the Indiana State Police crash reconstruction expert who inspected the accident site could determine who had been driving the Jeep at the time of the mishap. The police expert was not aware of any experts who could have determined who had been driving the Jeep based on "where these individuals ended up in the field[.]" *Id*. at 453.

On November 16, 2007, the State obtained an indictment alleging three counts against Crisp, two of which were dismissed before trial. On June 6, 2008, after a three-day trial, a jury found Crisp guilty of the remaining count of reckless homicide, a class C felony. On July 7, 2008, the trial court sentenced Crisp to seven years, with six years executed and one year suspended to probation. Crisp now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Admission of Evidence

Before trial, Crisp moved to suppress Sheriff Pritchett's testimony regarding the shoe that he found on the Jeep's accelerator on the grounds that it was irrelevant because there was no evidence linking the shoe to Crisp and that the shoe "may in fact be exculpatory" but was not preserved by the police. Tr. at 136. The trial court denied Crisp's motion and admitted Sheriff Pritchett's testimony at trial without objection.

On appeal, Crisp contends that the trial court erred in admitting the testimony. "It is well established that a motion to suppress is insufficient to preserve error for appeal. A defendant must instead reassert his objection at trial contemporaneously with the introduction of the evidence to preserve the error for appeal." *Jackson v. State*, 890 N.E.2d 11, 15 (Ind. Ct. App. 2008) (citation omitted). A defendant's failure to object to evidence at trial results in waiver of the issue on appeal unless she can establish fundamental error. *Caron v. State*, 824 N.E.2d 745, 751 (Ind. Ct. App. 2005) (citing *Hornbostel v. State*, 757 N.E.2d 170 (Ind. Ct. App. 2001), *trans. denied* (2002)), *trans. denied*.

> The fundamental error exception to the waiver rule is an extremely narrow one. To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. This exception permits reversal only when there has been a blatant violation of basic principles that denies a defendant fundamental due process.

Id. (citations omitted). Crisp does not allege, let alone establish, that the trial court committed fundamental error in admitting Sheriff Pritchett's testimony. As such, we need not address this argument further.

To the extent Crisp suggests that her due process rights were violated by the State's failure to preserve the shoe, we disagree. As we explained in *Land v. State*, 802 N.E.2d 45 (Ind. Ct. App. 2004), *trans. denied*,

> To determine whether a defendant's due process rights have been violated by the State's failure to preserve evidence, we must first decide whether the evidence in question was "potentially useful evidence" or "materially exculpatory evidence." *Chissell v. State*, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), *trans. denied*. Potentially useful evidence is defined as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id*. (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988), *reh'g denied*). The State's failure to preserve potentially useful evidence does not constitute a denial of due process of law "unless a criminal defendant can show bad faith on the part of the police." *Id*. "Bad faith is defined as being 'not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity.'" *Wade v. State*, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*.
>
> On the other hand, materially exculpatory evidence is that evidence which "possesses an exculpatory value that was apparent before the evidence was destroyed" and must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Chissell*, 705 N.E.2d at 504 (quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413 (1984)). "Exculpatory is defined as '[c]learing or tending to clear from alleged fault or guilt; excusing.'" *Wade*, 718 N.E.2d at 1166. The scope of the State's duty to preserve exculpatory evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000). Unlike potentially useful evidence, the State's good or bad faith in failing to preserve materially exculpatory evidence is irrelevant.

Id. at 49-50. "While a defendant is not required to prove conclusively that the destroyed evidence was exculpatory, there must be some indication that the evidence was exculpatory. We cannot assume that the destroyed evidence contained exculpatory material when the record is devoid of such indication." *Chissell*, 705 N.E.2d at 504 (citation omitted).

If anything, the record before us indicates that the shoe was *inculpatory*, not exculpatory. Brandon Bell, Jeremy's brother, testified that Crisp was wearing flip-flops on the night of the accident. Tr. at 715. Caraballo's mother testified that her son has never worn flip-flops. *Id*. at 618. The coroner testified, and photographs of the accident site demonstrate, that Jeremy was wearing socks and no shoes when he was found dead in the cornfield. *Id*. at 346.[2] Defense witness Ryan Gick testified that he saw "at least one" of Jeremy's shoes in the Jeep when he viewed the vehicle in a salvage yard after the accident, *id*. at 675, but Crisp failed to elicit testimony regarding its appearance. Under these circumstances, we cannot assume that the shoe was materially exculpatory. At most, the shoe can only be considered potentially useful, and Crisp has neither alleged nor established that the police acted in bad faith in failing to preserve the shoe. Consequently, we find no due process violation and no other grounds for reversible error.

II. Sufficiency of Evidence

Crisp challenges the sufficiency of the evidence supporting her reckless homicide conviction, specifically contending that the State failed to prove beyond a reasonable doubt that she was driving the vehicle at the time of the crash that resulted in Jeremy's death.[3] Our standard of review is well settled:

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[2] The copies of the photographs in the transcript do not have exhibit numbers.

[3] "A person who recklessly kills another human being commits reckless homicide, a Class C felony." Ind. Code § 35-42-1-5. "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Ind. Code § 35-41-2-2(c). Crisp does not challenge the sufficiency of the evidence regarding the mens rea element of the crime.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (citation omitted) (emphasis in *Drane*). "We must respect the jury's exclusive province to weigh conflicting evidence." *Hall v. State*, 870 N.E.2d 449, 462 (Ind. Ct. App. 2007), *trans. denied*. "Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Drane*, 867 N.E.2d at 146 (citation and quotation marks omitted).

Moreover, "a conviction may be based purely on circumstantial evidence. On appeal, the circumstantial evidence need not overcome every reasonable hypothesis of innocence. It is enough if an inference reasonably tending to support the conviction can be drawn from the circumstantial evidence." *Hayes v. State*, 876 N.E.2d 373, 375 (Ind. Ct. App. 2007) (citations and quotation marks omitted), *trans. denied* (2008).

Crisp asserts that "[t]he amount of doubt as to [her] culpability here was staggering in light of the weak evidence." Appellant's Br. at 12. Crisp's lengthy argument in this regard is merely an invitation to reweigh evidence and assess witness credibility in her favor, neither of which may do on appeal. The probative evidence supporting the jury's verdict indicates that Brandon Bell saw Crisp wearing flip-flops on the night of the accident and that Jeremy was so intoxicated that he had to be helped into the Jeep's front passenger seat. Jeremy's BAC (.22) was more than twice that of Crisp's (.09). Both Brandon and Brittany Escamilla

saw Crisp drive her boyfriend's Jeep out of the bar's parking lot toward her intended destination. Caraballo testified that he climbed into the back seat of the Jeep, lost consciousness shortly after leaving the bar, and awakened in the cornfield.[4] He further testified that no one changed places in the Jeep after they left the bar and that he would have awakened had they "stopped somewhere" before the accident. Tr. at 386. Crisp's mother told a paramedic that Crisp was "more than likely" the driver of the Jeep "because when [she] had her boyfriend's vehicle, she would not let anybody else drive it but herself." *Id*. at 608. She also acknowledged that she had never seen Jeremy or Caraballo drive the Jeep. *Id*. at 583. Finally, as mentioned earlier, Sheriff Pritchett testified that he saw a sandal "wedged … onto the accelerator" of the Jeep at the accident site. *Id*. at 575. Caraballo's mother testified that he had never worn flip-flops. Based on the foregoing, we conclude that the State presented sufficient circumstantial evidence to support a reasonable inference that Crisp was driving the Jeep at the time of the accident. Therefore, we affirm her conviction.

III. Sentencing

Crisp challenges the appropriateness of her seven-year sentence. Pursuant to Indiana Appellate Rule 7(B), this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the

[4] Crisp characterizes Caraballo's testimony as "incredibly dubious." Appellant's Br. at 13. "Application of the 'incredible dubiosity' rule is limited to those situations where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." *Baumgartner v. State*, 891 N.E.2d 1131, 1138 (Ind. Ct. App. 2008). At the very least, the rule is inapplicable here because Caraballo was not the sole witness and there is ample circumstantial evidence of Crisp's guilt.

burden of persuading us that his sentence has met the inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

"[R]egarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id.* "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Ind. Code § 35-50-2-6. Crisp herself acknowledges that she and her friends "exercised extremely poor judgment in becoming intoxicated" and deciding to "drive to another party where they could drink another unnecessary case of beer at the victim's parent's [sic] home." Appellant's Br. at 21. Crisp and her friends had also been smoking marijuana. Crisp drove the Jeep over 100 miles per hour, lost control, and left the road, causing the Jeep to roll multiple times and eject its unrestrained occupants into a cornfield. The extreme recklessness of Crisp's behavior certainly supports a term of imprisonment above the four-year advisory sentence.

As for Crisp's character, the State observes that while she has been convicted of only one offense, "she has been subject to six charged offenses, and one uncharged offense, and that of those seven, six were for substance related crimes." Appellee's Br. at 31-32. Of particular interest to this case, Crisp entered into a diversion program in February 2007 for a class B misdemeanor public intoxication charge and was placed on unsupervised probation that was to end in February 2008. Also, Crisp was charged with class A misdemeanor and class C misdemeanor operating while intoxicated ("OWI") as a result of a January 2007 incident, and this proceeding was pending at the time of the accident in May 2007. Crisp

pled guilty to class C misdemeanor OWI prior to the sentencing hearing in this case. Obviously, Crisp learned nothing from her previous encounters with the criminal justice system as a result of her problems with drinking and driving, which reflects poorly on her character. In sum, Crisp has failed to persuade us that her sentence is inappropriate.

Affirmed.

ROBB, J., and BROWN, J., concur.